For the Ninth Circuit.

WILLIAM PAPPAS, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Idaho, Eastern Division.

R. M. TERRELL,
WILLIAM EDENS,
Attorneys for Plaintiff in Error,

WILLIAM PAPPAS, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

STATEMENT OF CASE.

The plaintiff in error, William Pappas, was indicted in the United States District Court, District of Idaho, for the violation of the Mann White Slave Act of June 25th, 1910, and was charged with unlawfully transporting or causing to be transported one Zella Pappas from Rock Springs, Wyo., to Pocatello, Idaho, for immoral purposes in violation of said Act. (Rec., page 7.)

The defendant was tried in the United States District Court at Pocatello, Idaho, and was found guilty on each of the three counts in said indictment and on the 21st day of October, 1916, was by the United States District Court sentenced to serve a term of twenty months in the United States Penitentiary at

has brought this cause to this Court on Writ of Error.

During the trial of said cause Zella Pappas was called as a witness on behalf of the government and testified that her home was in Rock Springs, Wyoming. (Rec., p. 17.)

And that she was the wife of William Pappas on the 15th day of July, 1916, and is now the wife of the defendant, and that she had never been divorced from defendant. These facts having been proven, the defendant's counsel objected to this witness testifying against defendant for the reason that she was the wife of the defendant and not a competent witness to testify against him in this cause, which objection the Court over-ruled and defendant duly excepted. (Rec., p. 18.)

Thereafter the witness, Zella Pappas, wife of the defendant, was permitted to testify against the defendant, William Pappas, her husband. (Rec., pages 20 to 43.)

Charles A. Baldwin, another witness, was called by the government and over the objection of the defendant stated that in the month of July, 1916, he had conversation with witness, Zella Pappas, the wife of the defendant, in which she said:

> "My God, I would fall dead if I had to go down before that Judge and pay a fine. And that he, Baldwin, then left the room and that Zella Pap-

of the defendant. (Rec., p. 44.)

During the trial of this cause there was introduced in evidence by the government, over the objections of the defendant, a letter as follows:

"CROW HOTEL

"Pocatello, Idaho, June 30, 1916.

"My dearest Mae:

"I gess you wont care to hear frome me but I hope you wont turn me down because I took the step I am sorry for will you Mae. God nos I am the unhappiest girl that has ever walked in shoes but as soon as I get well I am going to make some money and good night Zell. You no how I went to work and married bill and here I am 2 days married and wants me to hustle, but when I do it will be for myself to—"

(Explanation by Mr. Smead, District Attorney.)

"Mae will you please promiss me you wont tell Mother that I am heart broken for I told her in the letter I was happy but I am not nor never will be.

"I done it more to be my own boss, but give me single life. Mae I love you for you were good to me and I can't stand to stay away from you. You were better to me than ever my own folks were so for God's sake dont you turn me down will you Mae. Well I cant write any more for I cant stand it so be good Mae and tell Frank to do the

P. S. My Address is Mrs. William Pappas, Gen. Del. Please write to me soon and lots of love to you both."

Which letter was written by Zella Pappas, the wife of the defendant, William Pappas, to May Everson.

The errors complained of and urged in this Court are as follows:

FIRST ASSIGNMENT OF ERROR.

That the United States District Court for the District of Idaho erred in permitting Zella Pappas, the wife of the defendant, to testify in said action on behalf of the plaintiff over the objections and without the consent of the defendant.

Upon this question there seems to be an irreconcilable conflict of authority in the opinions of the Circuit Court of Appeals and the various District Courts of the United States but we are of the opinion that the weight of authority and better reasoning of the cases in point is against the right of the wife to testify against the husband, in cases like the one at bar and of similar nature:

> "The competency of witnesses in criminal trials in the Courts of the United States is not governed by statute of the State where the trial is brought but by the common law, except where Congress has made specific provisions on the subject."
>
> Logan vs. U. S., 144 U. S. 263, 303, 12 Sup. Ct. 617, 36 L. Ed. 429.

It is a well known rule of common law that neither husband nor wife was a competent witness in a criminal action against the other except in cases of personal violence, the one upon the other.

This principle of the common law has been ably discussed in several cases by the Supreme Court of the United States.

Bassett vs. U. S., 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762.

Hopkins vs. Grimshaw, 165 U. S. 342.

The case of the United States vs. Bassett was a case appealed from the Supreme Court of the territory of Utah and envolved the right of the wife to testify against her husband in a prosecution for the crime of bigamy and envolved the direct question as to whether or not the crime of bigamy constituted personal violence against the wife, and in this case it is clearly held that personal violence meant at the common law an assault by the husband or wife upon the person of the other. Quoting from the opinion of the Court, it is said:

> "That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he

her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels and suffers, but whether the crime is one against her. Polygamy and adultry may be crimes which involve disloyalty to the marital relation but they are rather crimes against such relation than against the wife.

"We conclude, therefore, that under this statute (this statute being merely an reinactment of the common law rule) the wife was an incompetent witness as against her husband."

We contend that the principle involved and so well defined in this case should be the controlling principle applied in cases of violation of the White Slave Act and crimes of similar moral turpitude as adultry and polygamy.

In Johnson vs. U. S., 221 Fed. 250, which was an opinion by the Circuit Court of Appeals for the Eighth Circuit, it being the case in which this question was directly involved and being a prosecution for violation of the Mann Act, the principle laid down in the Bassett case was followed.

We find in the case of U. S. vs. Rispiku, 189 Fed. 271, being a memorandum opinion by the District Court of the Eastern Division of Pennsylvania, that a different view was taken and in this case the District Judge held in favor of the competency of the wife to testify where the crime charged was a viola-

principle of the common law as approved in the cases heretofore cited by the Supreme Court of the United States.

The opinions of the Supreme Courts of the various states are irreconcilable and so also is the opinions by the different U. S. District and Circuit Courts, and we submit that no real cause exists or has existed for such a conflict in the opinions in the various District Courts, and the Circuit Courts of Appeals, if the principle laid down by the Supreme Court of the United States in the cases herein cited had been followed for the reason that the principle laid down in these is plain and we can see no just cause to be mistaken as to the principles laid down and approved in these cases.

Under the present statutes of the law and conflict in authorities the wife may be permitted to testify against her husband in the U. S. District Court in one circuit and in another circuit a different rule prevails.

It was within the power of Congress to make the wife a competent witness against her husband in prosecution for violations of the White Slave Act, but Congress did not see fit to incorporate such a provision in the Act as passed, and until the law is amended we are of the opinion that the wife is not a competent witness against her husband and without his consent in a case of this character.

ter written by the defendant's wife, Zella Pappas, to Mae Everson, being the letter set out in full in the statement of the case herein.

The contention of plaintiff in error is that this letter was inadmissable in evidence for two reasons:

(a) That the writer of the letter was the wife of the defendant and any declaration or statement made by her, she at this time being the wife of the defendant and not a competent witness against the defendant, would not be competent evidence against the defendant.

(b) That same is heresay evidence and a statement made by a third party without the hearing of the defendant and without his knowledge and consent and therefore incompetent and inadmissable, a hearsay.

If it should be decided by the Court that the wife was a competent witness against the defendant, then the statement or letter passing between the defendant's wife, Zella Pappas, and the third person without the knowledge and consent of the defendant would come within the general hearsay rule and would not be admissable under said rule excluding hearsay evidence, the same not coming within any exception to the rule.

If this letter had passed between the defendant and his wife and had come into the hands of a third party, then there might be some reason for admitting this letter in evidence; otherwise, it is incompetent.

Zella Pappas, the wife of the defendant.

This evidence is inadmissable for the same reasons as set forth in Assignment of Error number two, coming within the rule of hearsay evidence and being a statement made by the defendant's wife, she not being at the time of the making of the statement a competent witness against the defendant. The conversation referred to being more fully set out in a statement of the case herein.

We therefore respectfully submit to the Court that said judgment of the United States District Court for the District of Idaho should be set aside and a new trial granted.

Respectfully submitted,

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